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No. 84-1475

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

HOLOCARD,
a California general partnership,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,
WESTERN ELECTRIC CO., INC.,
GENERAL TELEPHONE & ELECTRONICS CORPORATION, AND
GENERAL TELEPHONE COMPANY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In an antitrust case brought under Sections 1 and 2 of the Sherman Act, was summary judgment correctly granted to the defendants when the record, construed in the light most favorable to plaintiff, contained no evidence of conspiracy or monopolization?

2. Where the district court on motion for reconsideration considered all evidence properly before it, including evidence that plaintiff was not prejudiced by any conduct of its former counsel, and where any "new evidence" raised no genuine issue of material fact, did the court abuse its discretion by refusing to set aside its summary judgment?[1]

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[1] This brief is submitted on behalf of (1) respondents American Telephone and Telegraph Company, Pacific Bell (formerly The Pacific Telephone and Telegraph Company), AT&T Technologies, Inc. (formerly Western Electric Company, Incorporated) (hereinafter collectively the "AT&T respondents"), and (2) GTE Corporation (formerly General Telephone & Electronics Corporation) and General Telephone Company of California (hereinafter collectively the "GTE respondents").

A list of respondents' parent companies, subsidiaries and affiliates is contained in the Appendix hereto.

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OPINIONS BELOW

The memorandum of decision below is unreported, the Ninth Circuit panel having concluded that the issues presented by the appeal did not meet the standards set by Rule 21 of the Rules of the Ninth Circuit Court of Appeals for disposition by written opinion (Pet. Appx., p. 14). That memorandum affirms a summary judgment for respondents, granted by the district court in an unpublished memorandum (Pet. Appx., p. 1).

STATEMENT OF THE CASE

Petitioner's "statement of the case" contains many assertions not supported by, or contrary to, the record. The relevant facts are as follows:

In 1975, petitioner approached various telephone companies, including respondents, to seek their participation in a scheme to transmit credit data by telephone (C.R. 114, 124).[2] Responsible persons at each of the respondent companies believed that implementation of petitioner's scheme would be burdensome, of doubtful legality and otherwise unfeasible (C.R. 115, 116, 119-122). Each company independently decided not to participate (id.).

In 1977, petitioner filed a complaint with the California Public Utilities Commission, seeking an order requiring the telephone companies to provide the services needed by petitioner to implement its credit verification scheme (C.R. 117, pp. 4-7). The California Public Utilities Commission found that the telephone companies were not obligated to provide these special services, which were not provided to others, and further found that its decision would have little or no effect on competition in the field of credit verification, because petitioner could still enter that field on the same basis as others (C.R. 117, pp. 27-29).

In 1979, petitioner sued respondents, as well as two banks (which have since been dismissed from this action), alleging violations of Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Petitioner retained a succession of attorneys who remained counsel of record until July 23, 1980 (C.R. 69).

From July 1980 to June 1982 (during most of which period the action was stayed pending final resolution of the California Public Utilities Commission proceeding), petitioner appeared *in propria persona* (C.R. 69). In June 1982, petitioner retained a new attorney, Mr. Gary Near (C.R. 103). Nearly a year later, respondents filed their summary judgment motions. Mr. Near filed opposition papers, including declarations of petitioner's principals,

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[2] Unless otherwise indicated, citations are to the clerk's record ("C.R.") in the court below.

and he appeared and argued at the hearing on the summary judgment motions. Those motions were granted on June 14, 1983.

At that point, petitioner substituted its present counsel, and filed a motion pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure ("Rule 59/60 motion") to alter or amend the order granting summary judgment. That motion was based upon a claim that Mr. Near had been incompetent. Petitioner made certain allegations regarding Mr. Near's course of conduct, outlined certain discovery which its new counsel wished had been conducted, and reiterated petitioner's unsubstantiated belief that, because respondents all rejected petitioner's proposal at approximately the same time, they must have been acting in concert and for an anticompetitive motive.

The district court denied petitioner's Rule 59/60 motion. The Court of Appeals affirmed the order granting summary judgment, holding that "Holocard has failed to put forth any evidence beyond its conclusory allegation that the telephone companies engaged in activities that are barred by the Sherman Act" (Pet. Appx., p. 16). The Court of Appeals also affirmed the district court's denial of petitioner's Rule 59/60 motion, noting that "[m]otions to reconsider are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances. . . . The circumstances of this case are not of the extraordinary nature that would warrant setting the summary judgment aside" (id.).

ARGUMENT

This case presents no novel issue, no conflict between cases, nor any other matter worthy of the attention of this Court. The court below found the issues presented to be so insubstantial that it declined to decide the case by way of a published opinion.

I

IN AN ANTITRUST CASE BROUGHT UNDER SECTIONS 1 AND 2 OF THE SHERMAN ACT, SUMMARY JUDGMENT WAS CORRECTLY GRANTED TO THE DEFENDANTS WHEN THE RECORD, CONSTRUED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, CONTAINED NO EVIDENCE OF CONSPIRACY OR MONOPOLIZATION

Contrary to petitioner's assertion (Pet., p. 10), the lower court decisions do not depart from accepted precedent. The Court of Appeals expressly recognized that "summary judgments should be granted sparingly in antitrust litigation," but that "summary judgment is proper once the allegations in the complaint are rebutted by probative evidence supporting an alternative interpretation of the defendant's conduct and if the plaintiff then fails to come forward with specific factual support for its allegations" (Pet. Appx., p. 16). As admitted by petitioner (Pet., p. 12), all appellees submitted sworn declarations in support of their summary judgment motions specifically rebutting petitioner's allegations and establishing that its scheme was rejected by each of them for independent business reasons and not as the result of any antitrust conspiracy or anticompetitive motive (C.R. 115, 116, 119-122). Petitioner, however, has not come forward with any evidence which would support its claims.

Rather, the Court of Appeals and the district court were both faced with a compendium of unrelated conjecture and speculation. Before this Court, petitioner has simply restated that lengthy, but utterly conjectural, catalogue of "facts." Much of petitioner's "evidence" was never submitted in admissible form. Moreover, much of that "evidence" relates to respondents' *current* activities,[3] and it cannot, therefore, provide any factual support for a claim that respondents were engaged in an anticompetitive conspiracy in 1975. Much of the "evidence" was

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[3] Since divestiture of the Bell System in 1984, the business activities permitted to respondents have differed from those in 1975, nine years earlier, when a different economic, technological, legal, regulatory and business climate prevailed.

belatedly submitted, and most of it consists solely of the unsupported speculations of petitioner's principals about respondents' alleged motivations and their "tough company policy to resist competition" (Pet., p. 17).[4] Moreover, no evidence has *ever* been submitted to suggest any joint action or common interest of the AT&T respondents and the GTE respondents.[5]

Petitioner appears to concede that this Court's recent decision in *Copperweld Corp. v. Independence Tube Corp.* (1984) ___ U.S. ___, 104 S.Ct. 2731 disposes of its claims against Western Electric Company, Incorporated and General Telephone Company of California (Pet., p. 11). It is unnecessary, in this case, to analogize the *Copperweld* holding to the case of a 90% owned subsidiary, as The Pacific Telephone and Telegraph Company then was, because here again petitioner has produced no evidence to rebut respondents' evidence of independent action.

Despite petitioner's lengthy and detailed "factual" exposition, petitioner's conspiracy claims rest on just one fact: at approximately the same time, all of the telephone companies rejected its proposal to enter into what amounted to a joint venture with petitioner.[6] As both courts below correctly found, evidence of

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[4] Petitioner's reliance on statements of the AT&T Chairman and others in *Southern Pacific Communications Company, et al. v. American Telephone & Telegraph Company, et al.* (D.D.C. 1983) 556 F.Supp. 825, affirmed (1984) 740 F.2d 980, certiorari denied (1985) 105 S.Ct. 1359 is remarkable. In that case, the court found that those statements "[did] not evidence anticompetitive intent on the part of AT&T, but rather that AT&T intend[ed] to be an effective competitor" (556 F.Supp. at p. 892), and AT&T was exonerated from any wrongdoing.

[5] The declarations referred to by petitioner (Pet., p.14) show that, at most, an employee of AT&T and an employee of GTE may once have mentioned petitioner's proposal during a casual conversation on another subject (C.R. 115, 122).

[6] Although Holocard approached all of the telephone companies at approximately the same time, the telephone companies' decisions actually came over a period of several months (C.R. 31).

parallel behavior cannot alone support a claim of antitrust conspiracy. Where, as here, the defendants' affidavits show independent action, an antitrust plaintiff must provide specific factual support for an inference of "conscious parallelism" (*Zoslaw v. MCA Distributing Corp.* (9 Cir. 1982) 693 F.2d 870, 883, certiorari denied (1983) 460 U.S. 1085). Such specific factual support generally consists of evidence that the action of which plaintiff complains would be contrary to each defendant's independent business interest (id.). No such evidence has ever been submitted here.[7]

With respect to petitioner's monopolization claims, petitioner has similarly failed to produce any evidence to rebut respondents' evidence as to lack of any anticompetitive intent. As the Court of Appeals observed, there was nothing beyond petitioner's "conclusory allegation that the telephone companies engaged in activities that are barred by the Sherman Act" (Pet. Appx., p. 16).[8] Petitioner's assertion that the AT&T and GTE respondents together have monopoly power in the "telephone" business, without stating what effect, if any, that alleged power had on existing or potential providers of credit card verification services, cannot support its claims.

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[7] See p. 4, supra

[8] Although petitioner complains of error in the district court's refusal to consider certain belatedly submitted "evidence," all material offered in support of petitioner's claims was before the Court of Appeals. In any case, the district court acted well within its discretion in rejecting evidentiary materials submitted by way of purported reply. Moreover, even if that decision was erroneous (which it was not), it would present no question worthy of certiorari.

II

WHERE THE DISTRICT COURT ON MOTION FOR RECONSIDERATION CONSIDERED ALL EVIDENCE PROPERLY PEFORE IT, INCLUDING EVIDENCE THAT PLAINTIFF WAS NOT PREJUDICED BY ANY CONDUCT OF ITS FORMER COUNSEL, AND WHERE ANY "NEW EVIDENCE" RAISED NO GENUINE ISSUE OF MATERIAL FACT, THE COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO SET ASIDE ITS SUMMARY JUDGMENT

Petitioner's claim that it was deprived of due process as a result of the incompetence of one of its many attorneys is nothing but an attempt to raise a purely discretionary question to the level of a constitutional issue. As the court below correctly noted, "[m]otions to reconsider are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances" (Pet. Appx., p. 16).

This case does not present such exceptional circumstances. The counsel claimed by petitioner to be incompetent filed a brief in opposition to respondents' summary judgment motions. Indeed, the principals of petitioner filed declarations in which they attempted specifically to rebut statements in the GTE respondents' moving papers—moving papers of which they now claim to have been unaware. The record clearly shows that petitioner was aware of the status and progress of its case throughout, and was not prejudiced by any conduct of its counsel (see respondents' brief in Court of Appeals, pp. 22-25; C.R. 144, 150, 151). In any case, none of the new "evidence" submitted by petitioner's subsequent counsel, and considered by the Court of Appeals (see fn. 8, supra), would have changed the result. There remain no material issues of fact with respect to petitioner's claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Appendix follows)

Appendix

American Telephone and Telegraph Company has no parent company. In addition to its wholly owned subisdiaries, it has ownership interests either directly or through wholly owned subsidiaries in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc. d/b/a MITEK; AT&T and Philips Telecommunications, B.V.; AT&T and Philips Telecommunications Trading B.V.; AT&T and Philips Telecommunications (Belgium); AT&T and Philips Telecommunications U.K. Ltd.; AT&T and Philips Telecommunications A.G.; AT&T en Philips Telecommunicatie Bedrijzer B.V.; AT&T e Philips Telecommunicazioni S.P.A.; Unix Europe Limited; Cincinnati Bell, Inc.; ShareTech, Inc.; Tower Center Associates; and RMCOP Office Venture.

Pacific Bell is a subsidiary of The Pacific Telesis Group and has no affiliates or subsidiaries other than wholly owned subsidiaries.

AT&T Technologies, Inc., is a wholly owned subsidiary of American Telephone and Telegraph Company. In addition to its wholly owned subsidiaries, AT&T Technologies, Inc. has ownership interests in Communications Software Development, Inc. d/b/a MITEK; and Gold Star Semiconductor, Ltd.

GTE Corporation has no parent company. In addition to its wholly owned subsidiaries, it has ownership interests in Advance Industries Argentina S.A.I.C.; Claude S.A.; Arlux S.A.; GTE del Peru S.A.; GTE Electronica, S.A.; GTE de Panama, S.A.; GTE International Incorporated Limitada; GTE Industries Incorporated; GTE Precision Materials (France); GTE Sylvania, S.A. de C.V.; GTE Sylvania, S.A., Electronica, Quimica, Industrial y Comercial; GTE Telecomunicazioni S.P.A.; Sylvania Electronica Limitada; GTE Taiwan Communication Systems Ltd.; Kondo Sylvania Limited; Zinsco de Venezuela, C.A.; Valenite-Modco Industria e Comercio, Ltda.; The Micronesian Telecommunications Corporation; General Telephone Company of Illinois; La Compagnie de Telephone Anglo-Canadienne/Anglo-Canadian Telephone Company; British Columbia Telephone Company; A.T.N. Adaptive Testing Network Limited; Quebec-Telephone; and The Bonaventure and Gaspe Telephone Company, Ltd.

General Telephone Company of California is a subsidiary of GTE Corporation. General Telephone Company of California has no affiliates or subsidiaries other than a wholly owned subsidiary.